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## **Cases from the international criminal justice related to the status of aggression**

[DOI:10.5281/zenodo.17415682](https://doi.org/10.5281/zenodo.17415682)

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**Abstract:** The present paper aims to investigate the parties involved in a conflict. This is a frequent reality in recent years. The continuous violations of international law trigger a war for the guarantee of human rights and particularly for international humanitarian law by the defense of an illegal war. The theory of equal application, that is based on the indefensible morality of some facts in situations of war, reduces the willingness of states to comply with the system of international humanitarian law. The reduced application of norms of international humanitarian law and the implementation of certain norms have developed the theory of unequal application that disproportionately reduces international criminals, who come from aggressor states. The decisions of the prosecution are taken into account by the International Criminal Court. The office of the prosecutor of the Court has not considered the status of aggressor for the parties in conflict as a selection of cases but as a status that has influenced

the decisions of the prosecution, that is, as a *sub silentio*. Whoever started an invasion, a war with an intuitive way should expect what is foreseen by international criminal law.

**Keywords:** international criminal law; aggressor status; criminal case selection; Russo-Ukrainian War; criminal law; international law.

### Introduction

Much condemnation and an outcry from the international community was started even before the invasion of the Russian Federation in Ukraine, that is, February of 2022 (Combs, 2019; Combs, 2024). As a result we have the war that continues in Ukraine without a solution found at a global level (Åslund, 2022; De Luce, 2022; Pamuk, Landay, 2022; CBS News, 2022).<sup>1</sup> It was the Russian Federation that started the attack without a credible motivation from the international community against a neighboring state (BBC, 2022).

An invasion that was baptized as an event and fact that one state committed the crime of aggression against another (Pollman, 2022; Liakopoulos, 2024).<sup>2</sup> An aggression that violated without

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<sup>1</sup>UN General Assembly, leaders condemn Russia's war in Ukraine, Aljazeera (21 September 2022) <https://www.aljazeera.com/news/2022/9/21/at-un-general-assembly-leaders-condemns-russias-war-in-ukraine> Accessed on 24.09.2025; General Assembly Resolution ES-11/1 (2 Mar. 2022).

<sup>2</sup>Statement from the Global Institute For The Prevention Of Aggression on

precedent the protection of human rights by violating articles of the Charter of the United Nations. First of all, it violated the use of force against another nation.

The Russian Federation, through the first act of aggression, committed for a second time ferocious international crimes, such as the bombing of the Mariupol theater (Amnesty International, 2022), the massacre of civilians in Bucha (Human Rights Watch, 2022) and the destruction of the dam in southern Ukraine (Glanz and others, 2023; Kottasová, Mezszoftore, 2023). These are not simple acts of destruction but also involve the culture and strategic infrastructure of another state.

These are crimes that have alarmed other neighboring states in the area of Ukraine as well as the entire international community. The latter has even gone so far as to demand related criminal proceedings against Russian President Vladimir Putin as well as of other high-level leaders, namely the Russian oligarchy (Deutsche Welle, 2022; PBS New Hour, 2022; Mangan, 2022; CBS News, 2022; Liakopoulos, 2024; Kolliopoulos, 2024).

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Russia's Invasion of Ukraine: A Crime of Aggression (24 March 2022), [https://crimeofaggression.info/wp-content/uploads/GIPA-Statement\\_24-March-2022-7.pdf](https://crimeofaggression.info/wp-content/uploads/GIPA-Statement_24-March-2022-7.pdf) Accessed on 24.09.2025. Press Release, European Commission, Statement by President von der Leyen on the establishment of the International Centre for the Prosecution for the Crimes of Aggression against Ukraine, (4 March 2023), [https://ec.europa.eu/commission/presscorner/detail/en/statement\\_23\\_1363](https://ec.europa.eu/commission/presscorner/detail/en/statement_23_1363) Accessed on 24.09.2025.

It was the International Criminal Court (ICC) that began to prosecute international crimes on the territory of Ukraine through rapid investigations and inquiries.<sup>3</sup>

The ICC has begun a large-scale investigation into the crimes committed so far in Ukraine.<sup>4</sup> In March 2023, ICC prosecutors filed the first arrest warrants against Putin and Maria Alekseyevna Lvova-Belova in her capacity to Commissioner for Children's Rights in the Office of the President of the Russian Federation.<sup>5</sup> The charges were crimes against humanity. They forcibly deported Ukrainian children to Russia. Therefore, the international community was not surprised by these indictments against Russian citizens (Guardian, 2022; Boffey, 2022).

It was the Russian Federation that started the war. It specifically rejected international humanitarian law and the law that regulates war.<sup>6</sup> International humanitarian law and the violation

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<sup>3</sup>ICC, Press Release, International Criminal Court, Situation in Ukraine (2 March 2022): <https://www.icc-cpi.int/situations/ukraine> Accessed on 24.09.2025.

<sup>4</sup>Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation, ICC (2 March 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> Accessed on 24.09.2025; ICC Prosecutor Karim A.A. Khan QC announces deployment of forensics and investigative team to Ukraine, welcomes strong cooperation with the Government of the Netherlands, ICC (17 May 2022), <https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine> Accessed on 24.09.2025.

<sup>5</sup>Press Release, ICC, Situation in Ukraine: ICC Judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova (17 March 2023) <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> Accessed on 24.09.2025.

<sup>6</sup>International Committee of the Red Cross, International Humanitarian Law Answers To Your Questions (2014).

of human rights included *jus ad bellum* as the rule of the initial use of force and *jus in bello*, that is, the law that regulates the relative conduct of one's own war (Roberts, 2008; Mousa, 2008).<sup>7</sup> Laws that implicitly typify a war. The international humanitarian law thus imposes a rigorous separation for both (Weiler, Deshman, 2013).

The *jus ad bellum* considers that a party in the role of aggressor, who has violated the rules on the use of force and the status of aggressor as well as a party not relevant to the application of the laws that regulate the conduct of their war (Bugnion, 2004), was a restrictive reality that separated scholars.

An equal application (Greenwood, 1983; Roberts, 2008; Sloane, 2009) of the international humanitarian law establishes to a state that undertakes a war of aggression the rights provided by the *jus in bello*. Adversely, it forces the state to defend itself from a war of aggression that is regulated according to laws that have as its subject the aggressor state (Pollman, 2022; Combs, 2024). This position is unsatisfactory in several respects. A position that has as its object widespread and convincing criticism based on moral and philosophical aspects. Of course, its nature is convincing and the question of law remains unchanged.

Supporters of international humanitarian law are interested in the practical aspects and principles that consider the

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<sup>7</sup>Roberts affirmed that: “(...) *jus in bello* as the “laws of war” and *jus ad bellum* as the “law relating to the lawfulness of the use of force (...)”.

maintenance and operation of its system as a whole. The difference between the philosophical approach and practical necessity is part of an intuitive basis of a fundamental nature that requires and surpasses the application of norms of international humanitarian law.

The norms of international humanitarian law are recognized to all parties to the conflict, that independently differentiate between defender and aggressor.

The substantive norms of international humanitarian law apply equally to the parties to the conflict, particularly to the status of aggressor as part relevant to the norms of international humanitarian law that are applied. This is an unequal application that defends and describes questions of practical implementation of a standard that evaluates the conflict from the aggressor's point of view and the decisions of execution (Combs, 2024).

Execution norms such as *lex lata* seem to exert a powerful influence on the selection of cases of international criminal law. These are situations of international criminal law that usually end in a trial. In such cases, ICC prosecutors take into account the status of the aggressor, which influences the prosecutors' decisions from the very beginning.

### **Differentiation of international crimes as a path of practice and principles**

Equal application describes the fundamental principle of international humanitarian law that is based on laws that regulate war. Applying equally to combatants on all sides shows that military acts are judged by legal standards independently. They are committed by the service of one government that seeks to acquire its power in an open and illegal way. And on the other side by the other government that fights for the life of its citizens and the country against armed aggressors.

The position of moral philosophy launches comprehensive and detailed criticisms regarding equal application (Rodin, Shue, 2008). Space limitations prevent and explain the criticisms, namely that *jus in bello* and *jus ad bellum* do not operate independently. In such cases morality is admissible to fight a war for an unjust cause (Hurka, 2005; McMahan, 2006). It seems difficult to dispute a theory based on the criticisms of philosophers and jurists.

Jurists are faithful to the position of equal application by invoking the principles of their own defense. This is a convincing argument that focuses on the ascertainment of facts and the application of rules of *jus in bello* with differentiated manner in the aggressor (Lauterpach, 1953).<sup>8</sup>

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<sup>8</sup>Lauterpacht affirmed that: "(...) equal application doctrine is necessary because there during war between belligerents there is no authoritative judgment among



Neither party admits that it has violated *jus ad bellum*. There is, thus, no authoritative body capable of definitively determining this issue (Greenwood, 1989; Dinstein, 2001; Sassòli, 2007; McMahan, 2008; Kolb, 2014). It was the Security Council of the UN that decided on the matter but in reality it rarely does so in practice (Bugnion, 2002).<sup>9</sup>

The difficulties of the positions just mentioned are overcome when the fair application of a law is defended, that is, when it convincingly underlines the need for reciprocity of international humanitarian law (Kolb, 2014). International humanitarian law includes a large number of rules that few mechanisms on the other side seek to implement (Ferraro, 2008), to respect international humanitarian law (Combs, 2024).

Respecting rules of international humanitarian law has the risk of non-compliance. The application of *jus in bello* rules depends on the legality of the use of force by the own state as well as the fear that neither party adheres to the rules of the *jus in bello*.

The defending state respects the rules and does not demand its compliance. These are rules that they ask the soldiers of the aggressor state to respect. International jurists believe that abandoning equal application leads to widespread violation of the rules of the *jus in bello* by increasing the death and

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international organizations on the question of which belligerent side is the aggressor (...)."

<sup>9</sup>Bugnion affirmed that: "(...) aggression has occurred requires all five permanent members of the Security Council to vote in favor, a highly unlikely outcome (...)."

destruction in time. The law, therefore, seeks to convince equal application that drastically reduces the damage that is caused by its war.

### **Political reality and moral principle**

Trying to bridge the gaps between moral principles, which criticize the equal application of practices that support it, the focus shifts to the application of post-conflict international humanitarian law norms, namely the norms of international criminal courts, such as the ICC.

The office of the prosecutor of the ICC examines and decides on the status of aggressor. In this way, it contributes and ensures that the moral principles, that are supported by the international humanitarian law, mutually compromise the system that relies on and drastically limits resources as well as the number that violates international humanitarian law (Smith, 2022).<sup>10</sup>

We can also expect that national crime prosecutors are able to prosecute all violent crimes against credible evidence. Prosecutors select defendants from a diverse pool of criminals (Kotecha, 2020; Kiyani, 2020). International prosecutors have enormous discretion in the decisions of defendants (Bådagård,

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<sup>10</sup>International Criminal Court, Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report, at 209 (30 September 2020), <https://asp.icc-cpi.int/Review-Court> Accessed on 24.09.2025. Human Rights Watch, Human Rights Watch Briefing Note for the Twenty-First Session of the International Criminal Court Assembly of States Parties, at 6-9 November 2022.

Klamberg, 2016).<sup>11</sup>

The prosecutor of the ICC tries in a reasonable and transparent way to take into account real factors when selecting defendants (Ambos, Stegmiller, 2013). The prosecutor of the ICC also tries to identify relevant crimes.<sup>12</sup>

The prosecutors of the ICC identify the seriousness of each case by including quantitative and qualitative elements such as nature, scope, manner of commission and the specific impact of the crimes.<sup>13</sup> In practice the prosecutors consider the status of the aggressor and provide normative arguments that suggest doing so.

Within this context, the majority of defendants, who commit crimes are prosecuted (Combs, 2024). Such an action is strengthened by international criminal law, that promotes criminal objectives, such as retribution. The status of the aggressor is taken into account in decisions, strengthening the legitimacy of international criminal courts with their core

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<sup>11</sup>Bådagård, Klamberg affirmed that: “(...) international prosecutors exercise selectivity by concerning themselves mostly with the gravest of crimes such as war crimes, crimes against humanity, and genocide (...)”.

<sup>12</sup>Office of the Prosecutor, Policy paper on case selection and prioritization, par. 6 (15 September 2016): [https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf) Accessed on 24.09.2025. Office of the Prosecutor, Report on Prosecutorial Strategy, (14 Sept. 2006), <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07f> Accessed on 24.09.2025. Regulations of the Office of the Prosecutor, Regulation 29(2), ICC-BD/05- 01-09, (23 April 2009), <https://www.icc-cpi.int/sites/default/files/RegulationsOTPEng.pdf> Accessed on 24.09.2025.

<sup>13</sup>Policy Paper on Case Selection, op. cit., parr. 35, 37.

constituencies.

The ICC has attributed jurisdiction over the crime of aggression (Ambos, 2022).<sup>14</sup> It is the supporter of opponents of a jurisdiction that has debated its validity. A discussion that welcomes the proposal of the jurisdiction (Kreß, Von Holtzendorff, 2010).

Supporters have highlighted the jurisdiction of the ICC over aggression. The Assembly of States Parties has defined that the crime and jurisdiction of the ICC is restrictive in nature and the ICC does not prosecute the crime of aggression (Cowell, Magini, 2017; Heller, 2019; Marchuk, Wanigasuriya, 2022).<sup>15</sup>

The jurisdiction is susceptible and exercises its proposal by offering the option to prosecute aggression. The accused are not prosecuted for crimes of aggression but for war crimes and crimes against humanity, which provide a measure of punishment and deterrence.

Those who oppose the jurisdiction of the ICC in matters of aggression are non-governmental organizations, which generally support the international criminal justice of the ICC by nurturing the feasibility of a court, that prosecutes the crime of

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<sup>14</sup>International Criminal Court, Assembly of States Parties, The Crime of Aggression, ICC Res. RC/Res.6, Art. 8Bis(2) (11 June 2010). International Criminal Court, Assembly of States Parties, Activation of the jurisdiction of the Court over the crime of aggression, Doc. No. ICC-ASP/16/Res. 5, par. 1 (14 December 2017).

<sup>15</sup>Resolution on Legal and Human Rights Aspects of the Russian Federation's Aggression against Ukraine, European Parliament Document 2482 (2023).

aggression.<sup>16</sup> Their objections vary. They share a common concern that the ICC prosecutes aggression, as a general consequence of international relations.

The ICC contributes to this type of concern. It takes into account the status of the aggressor in its assignment for proceedings of international crimes. The convictions of the accused open a war concerning the illegal aggression, thus, increasing the likelihood for the accused of the aggressor parties to be prosecuted also for other crimes committed. This is a measure that finds a balance between the affirmation of potential consequences of a criminal prosecution for aggression and the complete impunity of the aggressors.

Prosecuting accused for the crime of aggression means promoting deterrent objectives. Thus, objectives that indirectly and to a lesser extent give rise to negative consequences are promoted. Opponents of jurisdiction are afraid of the jurisdiction of aggression. Prosecutors take into account the status of opponents when selecting defendants.

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<sup>16</sup>Resolution on Legal and Human Rights Aspects of the Russian Federation's Aggression against Ukraine, European Parliament Document 2482 (2023), 25-26: "(...) NGOs feared the ICC's aggression jurisdiction would deter well-meaning states while others worried the ICC would set the bar for aggression prosecution too high (...)".

### **What are the aggressor standards for case selection decisions?**

The Office of the Prosecutor has no difficulty considering aggressor status when selecting cases. The Office outlines a number of factors that guide case selection,<sup>17</sup> and aggressor status is added to the list. Aggressor status is considered for case selection and prosecutors are wise to consider general issues such as restrictions on parties considered aggressors. Individuals who cannot commit the crime of aggression are leaders of a state that initiates an illegal war against another state (Ambos, 2022).<sup>18</sup>

Prosecutors consider that aggressor status functions as a factor for case selection by limiting consideration to individuals who should do so. The majority of armed conflicts test aggressor status consideration only to leaders, who initiate armed conflicts between states (Roberts, 1995; Lieblich, 2016).

The objectives are pursued considering the status of aggressor in their selection for cases that do not depend on whether the aggressors have initiated an international armed conflict or not (Combs, 2024).

Restrictions on the relevant types of attacks that qualify the initiation of a war of aggression are also considered. The

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<sup>17</sup>Policy paper on case selection, op. cit., parr. 35, 37-41.

<sup>18</sup>Rome Statute of the International Criminal Court Art. 8Bis(3), 17 July 1998, 2187 U.N.T.S. 38544.

definition of the crime of aggression is limited to certain types of attacks and prosecutors consider the status of aggressor without importing other limitations.

The implementation of a limited form, that punishes deterrence against aggressors, increases the likelihood of being prosecuted by causing unlawful damage to armed conflicts. There is no difference for the unlawful act that initiated its own conflict. Prosecutors import a substantive version contained in the crime related to aggression.<sup>19</sup>

The crime of aggression is defined when an act of aggression, due to its character, scale and gravity, constitutes a violation, according to the principles of the UN (Ambos, 2022).<sup>20</sup> A standard is different from the aggression standard but relevant for the selection of cases. This standard thus suggests to prosecutors to take into account the status of the aggressor by selecting cases that have a level of factual certainty at the beginning of the conflict manifested as unlawful.

A rigorous standard of a substantive nature is defined to the crime of aggression by providing the precedent for determining the status of the aggressor to a full litigation (Combs, 2024).<sup>21</sup>

The status of the aggressor is a crucial factor for the decisions of

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<sup>19</sup>ICC. Res. 6, The Crime of Aggression (11 June 2010), RC/11, part II, 17, Annex 1.

<sup>20</sup>Art. 8bis(3) par. 1 StICC.

<sup>21</sup>Combs affirmed that: “(...) 2003 invasion of Iraq as an example of the difficulty of ascertaining accurate facts when aggressors claim they are acting in self-defense (...)”.

a prosecution. It selects cases only of a substantial confidence. Prosecutors use a broad definition of standards for the parties that initiate the conflict. Prosecutors apply a strict threshold for aggressor status where there is clear and compelling evidence that the parties acted unlawfully.

**Case selection in unclear conflicts by the ICC. Aggression status as a silence factor**

The aggressor status for the ICC prosecutors is considered in the case selection in an innovative way, consistent with moral intuitions playing a role in case selection. Situations for the ICC that come to trial confirm the aggressor status, that seems to exert a powerful influence, *sub silentio* in the case selection all along. In practice, the facts describe in detail and in summary some significant summary conclusions for the ICC prosecutors, who have brought charges against a party to the conflict. They are unclear and their origin is difficult to determine.

The manifestation of an offence initiates the relevant conflict. It is for the ICC prosecutors the basis for having indicted members of this party. Such situations for the ICC are divided. This means, that the prosecutor indicts members from one side of the conflict but also members from several sides. In this regard, the situation of the Democratic Republic of Congo and later Darfur, Kenya, Central African Republic (CAR) is recalled. These were



conflict situations that were not very precise and clear.

In these cases the prosecutor of the ICC indicted members of more than one party. The conflict seemed to ignore the status of the aggressor in the selection of its defendants. The borders of the Democratic Republic of Congo and the CAR were complicated cases as far as the facts are concerned. They started even before the establishment of the ICC and have continued for many years to the present day (Council on Foreign Relations, 2023).<sup>22</sup>

These are situations presenting starting points for acts of aggression that involve a number of parties that change frequently. The conflicts in Kenya and Darfur are simpler than the previous cases (Debos, 2008; Glasius, 2009).<sup>23</sup> The decision of the prosecutor to indict members of more than one party is in line with the principle of unequal application.

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<sup>22</sup>UN News, MINUSCA chief to security council: Decade-long cycle of conflict can be broken, <https://news.un.org/en/story/2023/06/1137947> (20 June 2023) Accessed on 24.09.2025.

<sup>23</sup>U.N. Office of the High Commissioner for Human Rights, Democratic Republic of the Congo, 1993-2003: Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, par. 60. Human Rights Watch, Democratic Republic of Congo (2003). Debos affirmed that: “(...) combatants’ loyalties are “extremely fluid” and they “may easily shift allegiance (...)”.

### **A partial prosecution of the conflict. Consideration of the status of aggressor**

The prosecutors of the ICC have indicted a party to the conflict in cases that are not led to a trial. As for example in the case of Mali, Uganda, Ivory Coast. The parties that are prosecuted in Ivory Coast and Mali were those, who initiated the conflict in an unequivocal manner. The creation of the conflict in Uganda was very complex.

In all situations prosecuting only a party to the conflict is not in line with the proposed indictment. The ICC for Mali sought to indict members of the Ansar Dine (Dine, 2018; Kendi, 2020)<sup>24</sup> since there was no doubt that these members initiated the conflict (Stewart, 2013).

The situation in Ivory Coast partly repeated the situation in Kenya. These are two situations that involved electoral conduct for the purpose of post-electoral violence. In Côte d'Ivoire unlike Kenya the respective party was involved in electoral misconduct by initiating violence (Rim, 2012; Butler, 2015).<sup>25</sup> It

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<sup>24</sup>ICC, Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence, par. 2, 10 (27 September 2016): [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016\\_07244.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_07244.PDF) Accessed on 24.09.2025. Prosecutor v. Al Hassan, Case No. ICC-01/12-01/18, Case Information Sheet (August 2023), <https://www.icc-cpi.int/sites/default/files/2023-08/al-hassanEng.pdf> Accessed on 24.09.2025. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Coalition for the International Criminal Court: <https://www.coalitionfortheicc.org/al-hassan-ag-abdoul-aziz-ag-mohamed-ag-mahmoud-0> Accessed on 24.09.2025.

<sup>25</sup>Economic Community of Western African States [ECOWAS], of The Authority of the Heads of State and Government of ECOWAS on the Situation in Côte d'Ivoire, Resolution A/RES.1/03/11 (25 Mar. 2011). U.N. SCOR, 66th Sess.,

is no surprise that the respective party was against ICC for its persecution as well as for the situation in Uganda. This was obvious given the decision of the prosecutors of the ICC that indicted members of the rebel movement as well as Lord's Resistance Army (LRA), that joined the conflict.

Peace seemed to be in their hands (Doom, Vlassenroot, 1999; Dunn, 2004; Dunn, 2007). The LRA extended the conflict and expanded its direction without return. Under such circumstances the prosecutors consider the LRA as the aggressor. They are oriented towards a disproportionate amount of criminal proceedings.

### **Conclusion**

The ICC considers the beginning of an armed conflict as the starting point for its investigations. The mutual necessity of war and the norms of international humanitarian law apply and take into account, who initiated the armed conflict, as well as the theory and practice of its facts.

The application of the norms of international humanitarian law does not find and does not take into account the status of the aggressor. The need for a differentiated application for the norms of international humanitarian law is based on the status of the aggressor.

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6508th mtg. at 2-3, S/PV/6508 (30 Mar. 2011) (reinforcing sanctions in Côte d'Ivoire).

The corresponding proposal develops the standard of application for prosecutors. Even a non-explicit factual basis for the prosecutors of the ICC takes into account the status of the aggressor from the beginning. Therefore, is not in all cases a rule to be taken into account.

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